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State v. Collom Appellant's Reply Brief Dckt. 43499

IN THE SUPREME COURT OF THE STATE OF IDAHO

DOCKET NO. 43499

DON COLLOM,
Appellant,

v.

STATE OF IDAHO,
Respondent.

On Appeal from the Sixth Judicial Magistrate Court
for the District of Idaho

CASE NO.: CV-2014-878

Honorable Mitchell W. Brown, Sixth Judicial District Court Judge

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. The State did not address the issues raised in Appellant's Brief.

The State's brief fails to address or respond to a number of important issues that Collom raised on appeal. These will be discussed more fully below. The most notable are:

A. The State fails to address or respond to Collom's fundamental due process right to have Monica Winder removed from the courtroom during E.O.'s testimony;

B. The State fails to address whether Monica Winder was a "victim" as defined in Idaho Code §19-5306(3);

C. The State fails to address or respond to important statements by the prosecutor, disparaging defense counsel and Collom personally, appealing to the emotion, passion or prejudice of the jury; and

D. The State fails to address the cumulative nature of the errors.

II. By incorrectly reframing the issues on appeal, the State misidentifies the correct standard of review and fails to address issues raised in Appellant's Brief.

A. The State fails to address or respond to Collom's fundamental due process right to have Monica Winder removed from the courtroom during E.O.'s testimony.

As identified in Appellant's Brief, Collom has a fundamental right to offer testimony of witnesses and to present his version of facts to the jury. (Appellant's Brief, p. 6, citing *Webb v. Texas*, 409 U.S. 95, 98 (1972)). Interference with a witness's testimony violates this fundamental Fourteenth Amendment right. *Id.* at 98. This policy and the law

are firmly recognized in Idaho, making it a crime to act in any way that interferes with a witness's "testifying freely, fully and truthfully in a criminal proceeding." *State v. Mercer*, 143 Idaho 108, 110 (Idaho 2006). In this case, the witness was told to not testify freely. (Trial Tr., p. 505, LL. 19-20; p. 507, LL. 16-19). Therefore, even if trial counsel failed to properly object, allowing Monica Winder to stay in the courtroom while E.O. testified, was Plain Error under the circumstances. Trial counsel did object, however, and brought the matter to the Court's attention "On the morning of April 13, 2015, immediately prior to going to trial . . . ." (R., pp. 268-269 of 336).[1]

The State attempts to reframe the issue as one of abuse of discretion under Idaho Rule of Evidence 615. (Respondent's Brief, p. 4). While it is true that Collom's counsel argued Winder's inappropriate conduct should prevent her from sitting at the "table" across from E.O because Winder violated the Court's March 26, 2015 exclusion order, the record shows that the fundamental problem was that Winder had instructed young E.O. to "withhold details" (Trial Tr. 505, L. 20), to "limit her responses to 'yes' or 'no'" . . . and to "refrain from providing any details about what she knew." (R., p. 269 of 336).[2]

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[1] This conversation with the Court and the prosecutor was apparently not recorded. The details of the conversation are therefore not available in their entirety. The documents filed by Collom's counsel in support of a new trial demonstrate that the objection was raised before and during trial, however. Further, the context of conversations which are recorded (just before E.O. testified), demonstrate that Collom had previously objected and was specifically upset by the interaction between Winder and E.O., because Winder had attempted to interfere with E.O.'s "voluntary" testimony.

[2] Corroborated in the Trial Transcript at pp. 504-507.

To the extent Collom identified the issue at trial as a violation of the Court's Exclusionary Order of March 26, 2015, the record is also clear that the real concern was the impact of the violation on E.O.'s testimony.[3] There is nothing in the record which establishes the State's claim that the trial court recognized the issue as one of discretion; a prerequisite to a claim that the Court acted within the bounds of that discretion and applied the appropriate legal standards. *State v. Adair*, 145 Idaho 514, 516 (2008).

The State's entire argument, predicated on the discretion to leave a potential witness in the courtroom under Idaho Rule of Evidence 615, is not applicable. It is not informative to the fundamental question and claim of error raised by Collom. Collom asserts that his Fourteenth Amendment rights were violated because the Court allowed an adult (who had tried to interfere with the testifying witness's testimony) to sit at the trial table, across from the child witness (who clearly expressed that she felt "intimidated" by that adult) during the witness's trial testimony. Given the disparity of age and the relationship (Monica Winder was the mother of the alleged victim, who was one of E.O.'s best friends), E.O.'s confirmation that she felt "intimidated" should be given significant consideration.

What is undisputed is that Monica Winder and J.T.W. approached E.O. and told her not to testify freely and voluntarily (Trial Tr., pp. 504-507). E.O. told the judge that

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[3] The Court's Exclusionary Order was broad. The Court had stated "My order expressly prohibits witnesses from discussing the case outside the courtroom, and that includes parents and children." (Rptr. Tr. on Appeal, Jury Pretrial Conference, March 26, 2015, p. 61, LL. 1-4). The record also shows that Monica Winder was aware of that admonition, because she heard it. *Id.* at p. 62, LL. 1-2.

she felt intimidated. (Trial Tr., p. 507). Collom's counsel cut his examination of E.O. short because it was "apparent" to him that E.O.'s testimony had been substantially affected by Monica Winder's presence in the courtroom. (R., pp. 270-272 of 336; *Memorandum in Support of Motion for New Trial*). These facts and Collom's contentions remain unrebutted.

The State has a primary and fundamental obligation to "see the defendant receive[s] a fair trial." *State v. Haggard*, 94 Idaho 249, 251 (1971). When a "substantial right" of a defendant is affected, the State is required to prove beyond a reasonable doubt that any error affecting the defendant's substantial rights did not "contribute to the verdict obtained." *State v. Parker*, 157 Idaho 132, 140 (2014); Idaho Criminal Rule 52. The State has failed to address Collom's fundamental Fourteenth Amendment right, clearly raised in his Appellant's Brief.

It cannot be said beyond a reasonable doubt that Monica Winder's presence did not interfere with the testimony of one of Collom's witnesses, in violation of his Fourteenth Amendment due process rights.

The State has therefore failed to prove, beyond a reasonable doubt, that the error claimed by Collom did not contribute to the verdict.

B. The State fails to address whether Monica Winder was a "victim" as defined in Idaho Code §19-5306(3).

The State continues to claim, just as it did at trial, that Monica Winder had the right to be present and sit across from E.O. during her testimony because she was a "victim" as

defined in Idaho Code §19-5306(3). (Respondent's Brief, p. 5; Trial Tr., pp. 258-260). The trial court failed, and the State continues to fail, to engage in any analysis to establish whether or not Monica Winder was or is a victim as defined by statute, however. Furthermore, there was a complete failure to recognize Collom's competing fundamental Fourteenth Amendment right, and, at a minimum, to balance Collom's constitutional interests against Monica Winder's. The State argues, "First, the witness was a victim by law and therefore exempt from exclusion under I.R.E. 615." (Respondent's Brief, p. 5). Neither the Court nor the State has ever undertaken to support this conclusion. Such an analysis would require (at a minimum) considering whether the alleged victim was of "such youthful age or incapacity as [to] preclude [him] from exercising [his] rights personally." Idaho Code §19-5306(3). Had an effort to apply a particular standard to the facts been undertaken (particularly with respect to the concerns raised by Collom that his witness had been interfered with and intimidated), the underlying problem and Collom's fundamental right would likely have been recognized and identified. Instead, the basis for the trial court's decision to allow Monica Winder to remain in the courtroom during E.O.'s testimony is unclear. We are left to wonder whether the Court perceived the matter as one of discretion; whether its decision was based on I.R.E. 615, Idaho Code §19-5306(3) or Article I, Sec. 22, of the Idaho Constitution; or whether its decision was based on something else. Thus, even an argument that the trial court did not abuse its discretion cannot be supported.

By restating and misframing the issues raised by Collom, the State has failed to address or respond to the fundamental errors raised by Collom, and has certainly not established beyond a reasonable doubt that the verdict was not impacted, in his case.[4]

C. The State fails to address or respond to important statements by the prosecutor, disparaging defense counsel and Collom personally, appealing to the emotion, passion or prejudice of the jury.

"It is improper to disparage defense counsel." (Respondent's Brief, citing *State v. Gross*, 146 Idaho 15, 19 (Ct. App. 2008)). Conceding this point, the State contends the prosecutor did not disparage defense counsel or direct comments toward defense counsel, but merely "commented" on "defense arguments and theories." (Respondent's Brief, p. 13). It is quite easy to disprove the State's claims by reference to the record. A few samples include:

> "Why do I talk about a parade? Because the **defense** has entered a whole lot of floats. **They** paraded people up here as quick as **they** could get them in and out yesterday."

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[4] The State's focus on the fact that "Collom has failed to show error in the denial of his motion for new trial" illustrates the problem. On appeal, Collom occasionally cites to his *Memorandum in Support of Motion for New Trial* because that portion of the record refers to arguments and evidence as they unfolded prior to and during trial, which may assist this Appellate Court in understanding Collom's arguments. Notably, however, Collom did not appeal the District Court's denial of a new trial under Idaho Code §19-2406. The actual issue is whether or not Collom was denied the right to a fair trial because (1) no remedial action was taken to address the interference and intimidation of one of Collom's witnesses and (2) the intimidator was allowed to sit across from a young child witness, during her testimony, after she had expressed to the Court that she felt intimidated.

(Emphasis added; Trial Tr., p. 565, L. 25- p. 566, LL. 1-3). These comments contain no reference to facts or evidence. They are part of an overall theme that Collom's criminal defense counsel is the conductor of a circus, prepared to use any form of artifice to awe and bamboozle the jury. Having labeled defense counsel, the prosecutor then endeavors to convince the jury there is a difference (not in the evidence) but in the character of defense counsel (and Collom) and the prosecutor (and his victim):

> "**They** entered all these floats and bands into the parade. Why did **they** do that? Again, **they** want to shift your focus away from that individual and put it on that kid back there. **They** want to say look over here, don't look over there. **We** call that a squid or an octopus defense."

(Emphasis added; Trial Tr., p. 566, LL. 3-8). Who are "they," and who are "we?" Clearly, "they" are the conductors of a charade; the bad guys. "We," on the other hand, represents those being attacked by a predator – the victims – the good guys.

Significantly, the prosecutor's references to defense counsel as a circus conductor followed immediately after he vilified defense counsel for forcing E.O. to go to Court and testify. The prosecutor stated,

> "**I feel bad** for E.O. because she had to leave a test at school to come over here. And you could tell she was pretty upset. She had a hard time testifying. She did a good job. **She felt bad** that she **had to be here**."

(Emphasis added; Trial Tr., p. 564, LL. 16-20). What kind of monster forces a young girl to leave an important school test just so she can appear as another float in its parade? A squid or an octopus.

In its Brief, the State misses the point of this exchange. The State argues that because defense counsel, himself, commented on E.O.'s leaving a test, no prejudice can be claimed; ignoring that a comment on trial logistics is vastly different from a character assassination. (Respondent's Brief, p. 16). The prejudice derives from the prosecutor's attack on defense counsel's character. The prosecutor conspicuously imputed that defense counsel's character was so poor that he would stoop to forcing young and innocent E.O. to leave her important test, just so she could be a side show in defense counsel's parade. Aside from comparing the character of a cold and calloused defense counsel to that of the prosecutor, what relevance do these comments have to the case? Why would it matter, otherwise, how the prosecutor ("I" in his words) feels?

There is an even deeper layer, however, when the comment is placed in complete context. Why was E.O. upset and had a "hard time testifying?" The prosecutor tells the jury that E.O. was upset because "she felt bad that she had to be here." *Id.* The jury did not know the real source of E.O.'s distress; the mother of her best friend, who had instructed her not to "volunteer" information and had "intimidated" her, got to sit directly across from her while she testified. The State therefore turned the criminal act of interfering with a witness into a bonus for the State by playing to the passions and

prejudices of the jury through characterizing Collom and his counsel as unfeeling animals, like a squid or octopus, who would stoop to anything and everything in order to get away.[5]

Throughout closing argument, the prosecutor pitted his character and that of "his" victim against that of defense counsel and Collom. Using this tactic and strategy, the prosecutor asked members of the jury to consider what they would do if their own child came to them and told them that their child had been sexually abused. Defense counsel did object to this line of questioning. (Trial Tr., p. 597, LL 19-25 - p. 598, LL 1-11).

Understanding the prosecutor's theme of comparing the "character" of defense counsel with that of the prosecutor helps to better understand the comparison of defense counsel with the Billy Flynn character in the play and movie *Chicago*. Significantly, at no time did the prosecutor focus on any evidence when talking about the sleazy defense attorney played by Richard Gere. Rather, he focused on how criminal defense counsel use "razzle-dazzle" to bamboozle the jury. Commenting on defense counsel's character, the prosecutor paraphrased Gere, stating: "**I'm** going to give them the little razzle-dazzle over here, to make you guys look in this direction. Okay? While **his client** just **slid** out the backside and **got away** with it." (Emphasis added; Trial T., p. 567, LL. 5-8). The theme remains clear and consistent; defense counsel is a monstrous squid or octopus.

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[5] Similarly, the comment by the prosecutor that J.T.W. "wasn't a bad employee" is a comment on the character of the individuals involved, and is clearly directed toward the individuals. There is a difference between talking about the evidence, and the facts, such as discussing what J.T.W. did or did not do as an employee, as opposed to providing personal opinions about the character of the alleged victim.

Continuing, the prosecutor stated:

> "That's what **we've** got going on here. **They're** giving **you** the razzle-dazzle. They're giving **you** the razzle-dazzle saying look here, look at **J.W.** Don't look at **my defendant** sitting right here. Look somewhere else. Let **us** hide behind **our** ink cloud."

(Emphasis added; Trial Tr., p. 567, LL. 9-13). Whose defendant is it? It's the sleazy defense squid's defendant.

Contrary to the State's argument, the prosecutor's emphasis was not on any evidence or argument, but the defense "hiding" behind "our" ink cloud. The prosecutor concludes "**I'm** asking **you** to look past **their** parade of witnesses and through **their** ink cloud." (Emphasis added; Trial Tr., p. 567, LL. 14-15). It is disingenuous to suggest the comments are anything but an unabashed attempt to appeal to the jury's passions and prejudices by comparing the helpless victim and his attorney against the predator defense counsel and his voracious client. It should not be lost on this Court that the next comment by the prosecutor was "Let's talk about the facts." (Trial Tr., p. 567, LL. 16).

The fact that defense counsel addressed the prosecutor's comments in closing is certainly not representative of a tactical decision to be associated with a circus trickster, a sleazy (win at all costs) defense lawyer or a monstrous predator. Defense counsel's subsequent argument reflects that defense counsel simply did not appreciate the level of inappropriateness of the prosecutor's underlying theme at the time it occurred. Failing to at least try to cure the malignant association would have been worse. (R., pp. 282-285 of 336).

Comparing the facts in this case with those of *State v. Gross*, the prosecutor's statements and behavior in this case are equal to or worse than those in *Gross*, where a conviction for a DUI was overturned. *State v. Gross*, 146 Idaho 15 (Ct. App. 2008). In *Gross*, the prosecutor called Gross a "liar" because he told the officer he had not consumed any alcoholic beverages. *Id.* at 18. However, because the defendant had placed his credibility in issue, and admitted to lying in connection with the case, the court concluded that the "troubling" conduct did not amount to misconduct. *Id.* at 19.

The prosecutor also "disparag[ed] defense counsel and vouch[ed] for his own credibility," however. *Id.* The instructions of the higher court in *Gross*, that a "prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that [his] opinion is based solely on inferences from evidence presented at trial" (*Id.*), should have been heeded in this case. If the law was not sufficiently clear prior to *Gross*, it certainly was by the time the prosecutor maligned defense counsel and injected his personal belief and opinion without any reference to the evidence in the present case. Turning a blind eye to such conduct is, at a minimum, a tacit approval of such behavior.

In *Gross*, the prosecutor stated that defense counsel was just "doing [his] job." It is not a compliment (in the eyes of a jury) to compare criminal defense counsel to a slick and dishonest lawyer, even if that "slick" lawyer is smooth and successful. The prosecutor in *Gross* also "engaged in misconduct by suggesting that the jury should trust and believe the officer and the prosecutor because they represented the State and, therefore, must be ethical." The prosecutor in this case did the same, and worse, as described above. In the

end, the Idaho Court of Appeals has made it clear that "closing argument should not include the prosecutor's personal opinions and beliefs about the credibility of a witness or inflammatory words employed in describing the defendant." *Id.* at 18. This is not a terribly difficult admonition to follow if a prosecutor remembers that he or she represents the state, and upholding constitutional principles associated with ensuring a fair trial are as important as obtaining a conviction.

Just as defense counsel failed to object in *Gross*, defense counsel failed to object to the prosecutor's aspersions in the present case. As recognized in *State v. Gross, supra*, Collom has a fundamental and substantial right to not have his attorney (or himself) portrayed as dishonest or sleazy, however. When prosecutorial misconduct rises to the level of fundamental error, the court must then consider whether the misconduct prejudiced Collom's right to a fair trial or whether it was harmless. *Id.* The *Gross* court explained "The test for whether prosecutorial misconduct constitutes harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct." *Id.*

Given the clear holdings in cases like *State v. Gross*, it is indisputable that Collom had a fundamental due process right that was violated if the prosecutor committed misconduct. The facts of this case clearly demonstrate that misconduct did occur. The standard is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. The necessary conclusion is that Mr. Collom is entitled to a new trial. Collom has demonstrated that his

constitutional rights were violated, that the error was clear and obvious and that the error reasonably could have affected the outcome of the trial proceedings. The facts lead to the conclusion (particularly considering the scantiness of evidence that Mr. Collom had engaged in any wrongdoing) that Collom was denied a fair trial and his Fourteenth Amendment rights were violated. It is the State's burden to provide Collom with a fair trial. *State v. Haggard* at 251. It clearly did not do so.

D. The State fails to address the cumulative nature of the errors.

The State's misstatement of and the reframing of the issues, in order to ignore or disregard the issues and arguments presented to this Court in Appellant's Brief, results in virtually no analysis of Collom's claims of cumulative error by the State. Each of the issues presented in Appellant's Brief and expounded upon in this Brief demonstrates that the accumulation of irregularities, when combined, show an absence of a fair trial in Don Collom's case. *See, e.g., State v. Field*, 144 Idaho 559, 573 (2007)

III. CONCLUSION

Don Collom respectfully asks that this Court vacate the judgment and conviction of lewd conduct with a minor under sixteen, and enter a judgment of acquittal. Alternatively, Collom asks that the judgment be reversed and remanded to the District Court for a new trial. The State has failed to object or respond to the salient issues raised in Collom's appeal, and Collom's claims and requests are primarily unrebutted.

DATED May 2, 2016.

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CERTIFICATE OF SERVICE

I certify that on this date, May 2, 2016, two copies of the foregoing *Appellant's Reply Brief* was served on the following named persons at the address shown and in the manner indicated.

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